IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TROBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
-vs-	)	Case No. 05-CV-329-GKF-PJC
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS,

held before the Honorable Paul J. Cleary, Magistrate Judge in the United States District Court for the Northern District of Oklahoma on February 26, 2009.

A P P E A R A N C E S

For the Plaintiff: Mr. Louis Bullock
Mr. David Riggs
Ms. Ingrid Moll
Ms. Kelly Burch and
Mr. Trevor Hammons
Attorneys at Law

(Appearances continued . . .)

(Appearances continued . . .)

For the Defendant Cargill: Mr. Del Ehrich
Ms. Theresa Hill and
Mr. Kerry Lewis
Attorneys at Law

For the Defendant Peterson: Ms. Nicole Longwell and
Mr. Scott McDaniel
Attorneys at Law

For the Defendant Tyson: Mr. Robert George and
Mr. Bryan Burns
Attorneys at Law

For the Defendant Cal-Maine: Mr. Robert Redemann
Mr. Robert Sanders
Attorney at Law

For Simmons Foods: Mr. John Elrod
Attorney at Law

For George's: Mr. James Graves
Attorney at Law

P R O C E E D I N G S

COURTROOM DEPUTY: Case Number 05-CV-329-GKF-PJC, Attorney General of the State of Oklahoma, et al. versus Tyson Poultry, Inc., et al. Counsel, please state your appearances for the record.

MR. BULLOCK: Louis Bullock for the State of Oklahoma.

MS. MOLL: Ingrid Moll for the State of Oklahoma.

MR. HAMMONS: Trevor Hammons for the State of Oklahoma.

MR. RIGGS: David Riggs for the State of

Oklahoma.

MS. HILL: Theresa Hill for Cargill, Inc. and Cargill Turkey Production, LLC and with me I've got Del Ehrich from Faegre & Benson in Minneapolis.

THE COURT: All right.

MR. ELROD: John Elrod with Simmons Foods.

MR. McDANIEL: Scott McDaniel representing Peterson Farms.

MR. GRAVES: James Graves for George's and George's Farms.

MR. REDEMAN: Robert Redeman for Cal-Maine.

MR. SANDERS: Your Honor, I'm Bob Sanders for Cal-Maine.

MS. LONGWELL: Nicole Longwell on behalf of Peterson Farms, Your Honor.

MR. BURNS: Bryan Burns for the Tyson defendants.

MR. GEORGE: Robert George also for with the Tyson defendants.

MR. LEWIS: And Kerry Lewis for the Cargill defendants.

THE COURT: All right. We've got several motions to deal with today and then I guess we're scheduled for another session on Monday. Let me hit a couple of things initially.

Although I don't think we listed it as on the docket for today, there was a motion for attorney fees. Docket Number 1729 has been referred to me. It's the attorney fee motion that emanates from Judge Joyner's ruling on the motion to order compliance or to compel compliance with a previous Court order and it was on appeal to Judge Frizzell. He's made some rulings and resolved it and it's now back before me. I guess the question I have is the fee request is about $13,000, and so my question to you is: Is that something that the parties can stipulate to or are we going to have to have a hearing on that issue or where are going on that one?

MR. BULLOCK: Judge, I'd like to look at that. Could we make or announcement on Monday as to that?

THE COURT: Sure. Sure. I did want to bring it up so that we can try and move as many of these things forward as possible.

And then CASRO, the industry group, has filed a motion for leave to file an amicus brief. Is there any opposition to that?

MR. EHRICH: Your Honor, Del Ehrich for the Cargill defendants. I will note this is rather unusual in a non-dispositive motion, a motion to compel, the amicus concedes, in fact, that what it's asking this Court -- is to create a new evidentiary privilege. It

doesn't exist under Rule 501. If the Court would find it useful as it considers these issues, however, we don't have an objection. We would like to consider response as a group and will note that that issue is distinct from, I think, the issues about the extension of a damage deadline today so that we would be reluctant to see the Court's consideration of that part of the motion delayed. In fact, all of these motions ought to be promptly decided because, of course, we are mindful of the remaining pretrial deadlines.

THE COURT: Well, you said you wanted opportunity perhaps to respond to it and then you told me that you want a ruling, so which one is it?

MR. EHRICH: Well, I don't think I said quite that. Let me try again. What's in front of Your Honor is a motion to extend the March 2nd damage -- (Interrupted)

THE COURT: Right. That's part of it -- (Interrupted)

MR. EHRICH: -- that's part of it. We believe there are grounds independent for the grant of that motion that is separate and apart from the considered materials issues, one part of which the amicus brief or the proposed amicus brief touches. We would be able to submit a prompt response, Your Honor, on that issue, on

the amicus issue.

THE COURT: Doesn't anybody else have any objection to the Court granting leave for CASRO to submit that brief for whatever it may be worth? If not, then I'll grant the motion for leave to file an amicus and if you folks want to file a response to it, can you -- how quickly can you do that because we do want to move this along?

MR. EHRICH: I would expect we can do it tomorrow morning.

THE COURT: That seems fast enough. The defendants will respond to the amicus brief by Friday.

Then as far as the remaining motions for hearing today, we have the motions by Peterson and Simmons for protective order which really, I think, are all one issue and we can take them up together. Who wants to start with a discussion of those motions? Will I hear from one person on behalf of Simmons and Peterson or will I hear from two?

MR. McDANIEL: Your Honor, I would like to start, but I think the company -- the two defendants may have a slightly different perspectives so the Court would hear argument from both. We appreciate it.

THE COURT: All right. And you're on behalf of Simmons?

MR. McDANIEL: Peterson Farms. Scott McDaniel for Peterson Farms. Thank you, Your Honor.

May it please the Court. Your Honor, I think the motion, the motions, together present a rather simple matter. This past July Peterson Farms and Simmons Foods consummated and executed an asset purchase agreement whereby Peterson Farms sold the bulk of its live production assets to Simmons Foods. Peterson Farms still remains in business, is still a member of the poultry industry, has focused its business at this time in its breeding and genetics and research and development. So, all those other assets were sold pretty much lock, stock and barrel to Simmons Foods. In July there was a little bit of press coverage and about a month later we received this request for production from the plaintiffs. We received those September 18th.

There were four requests that can be summarized very briefly. The first request asked for all the transactional documents; second request asked for all environmental due diligence documents related to all the assets; the third asked for all documents that relate to the reasons that Peterson entered this transaction; the fourth asked for all documents related to the lawsuit that were exchanged between the parties as part of this transaction.

Right off the bat we recognized and felt very strongly these were grossly overly-broad and that they seek irrelevant and highly confidential materials. And as to the fourth request, it clearly seeks to invade the joint defense and common interest privilege.

Now, Your Honor, the factual setting is obviously important for the analysis of whether this is appropriate discovery in the case. I think one of the most important points is there is no dispute between Peterson, Simmons and the plaintiffs on the fact that Peterson Farms' only assets within in Illinois River Watershed were the live chickens that at the time of the sale had been placed on the farms of contract growers. Peterson does not have, never has had, company farms in the watershed. All of the other assets Peterson employed in its live production business were basically in Decatur, Arkansas.

THE COURT: Which is outside the IRW?

MR. McDANIEL: Correct, sir. The other operational asset that was transferred was LP Gas Company, has little to do with the issues in the case. But nonetheless, that is situated in Jay, Oklahoma, also outside the watershed.

It was an asset sale. There was no stock exchanged. There was no agreement about transferring or

assumption of liability to Simmons. And Peterson and Simmons' counsel conferred, agreed that our positions were similar. We approached plaintiff's counsel collectively for a meet and confer process. We had a conference with two of plaintiff's counsel. It was productive for the first few minutes. And during the discussion -- and I have to be candid with Your Honor and I think we were candid in the papers, that we acknowledge there is information about this transaction that the plaintiffs are entitled to have. There has been a change in the operations of two of the defendants in this lawsuit, chiefly being that Peterson Farms no longer operates. They need to know that. They need to know that Simmons Foods has not accepted liability contractually or otherwise for any operations of Peterson Farms prior to the closing date. And we think that the plaintiffs have a right to know generally what was transferred. And we went into that meet and confer with an understanding that within this very broad range of documents there's something there the plaintiffs are entitled to. So our goal was to see if we can focus on that.

During the conversation the plaintiff's counsel articulated some of these reasons I just shared with you, and I think we reflected that, okay, that's sounds

reasonable and we can work with those issues. We need you gentlemen to put this in writing, narrow your request, then we can respond and we can proceed to produce. The request to put these specific relevant topics in writing as rejected. They asked for a quick peek, we declined a quick peek. They asked then, well, maybe they could narrow their request if we could provide them an index of the transactional documents. Well, at that time I didn't know whether there was an index or not. I didn't have the transactional package. I wasn't the Peterson's representation on the matter. Shortly after that in conferring with Simmons' counsel and asked them, well, what do you have in your package. I know in my packages there's no index. So, we couldn't take the approach of giving them an index.

So, I made a proposal and we submitted that to Your Honor as Exhibit 2 to the brief, my e-mail. What we suggested and still suggest as a solution to this is that we will be glad to provide them with a redacted version of the asset purchase agreement so that the information that they'll be provided will provide them the elements that we think are relevant, and that is, that it was an asset sale that did not transfer any potential liabilities arising in the case from Peterson and Simmons. It will describe the summary list of assets

sold to show that none of them were in the Illinois River Watershed. It will also identify for the plaintiffs that the poultry grower contracts which is Peterson's relationship to the IRW were note treated as an asset and they were not assigned. Any poultry grower under contract with Peterson Farms at the time of the sale had their own personal right and decision to make whether to enter a new contract with Simmons or to negotiate a contract with one of the other companies operating in the area or to sell their farm. In any event, they were not assigned and were not transferred.

We offered that. And the alternatives at that time were either, plaintiffs, we need you to refine your request or failing those two then we're going to have to seek relief from the Court. And we didn't get a response to that, and given that this is what we view to be highly confidential information regarding a private transaction between two closed family corporations, we had to do something before our response time, so hence here's the motion.

Given the factual setting and that the assets at issue here are just these chickens and there was no change of liability position for Peterson Farms, Peterson Farms hasn't nor will it assert that any exposure in this litigation is altered by virtue of this sale for any

pre-closing liabilities. That's all the plaintiffs need to know, and that is that it does not change who the party defendants are, it doesn't change who their claims are asserted against. What it does change is that from July 16th, 2008 Peterson Farms isn't in that watershed. So, all their theories regarding agency and their theories regarding pollution don't apply to Peterson from that point forward.

So, with that factual setting and those legal issues, Your Honor, we submit that the proposal that I made with Simmons' consent was reasonable and it was fair, and we think that's what they were entitled to.

Taking up how plaintiffs chose to respond to our motion for protective order, they made basically one statement on the second page of their response where they articulate for the Court what they believe is their basis for being able to invade these confidences. On page two they claim a right to four things. The nature of the assets transferred, that's number one. We don't dispute that. We agreed to give that to them. Number two, the manner of the transfer. Again, don't dispute that, we offered to give that to them. Number three, whether the fair market value given for the assets was fair and appropriate. Your Honor, we disagree with that one. It's irrelevant to any claim or defense in the case. The

last one, number four, is any agreements regarding the liability or indemnity. Again, Your Honor, we offered to give them that through the redacted asset purchase agreement.

When the plaintiffs rejected our proposal and did not respond, it brings us to the point we are today and that is, we would submit to Your Honor, that their requests now have to be adjudicated by you on their face. And it's on their face that we believe the over-breadth would lead the Court to the conclusion that Peterson doesn't need to respond. Now, with the exception of this request number four which we believe clearly gets into the joint defense and common interest privilege, we do not deny that there is potentially relevant, potentially discoverable information conceptually within the other three categories. But the way the plaintiffs are asking Your Honor to view this and to analyze it is by giving you some very narrow examples from those categories and then suggesting because they have hypothesized something narrow that may be by discoverable, you should grant discovery of the whole.

And let me give you a couple examples. On request for production number two which is the environmental due diligence request, the plaintiffs provide this argument in their brief that Peterson's

assets at the time of the sale in the watershed, chickens -- chickens defecate, chicken manure is a source of pollution, so therefore, to the extent there are documents evaluating manure production, land application, any manure or chicken litter impacts of any waters, that should be discoverable. Well, if they had spent as much time crafting their requests for production to say what they said in the brief, Peterson could have responded to that and I wouldn't dispute the relevance and discoverability of that. But the problem is, Your Honor, when they asked for all due diligence, that potentially reaches to any due diligence documents that relate to a processing plant which includes its own waste water treatment plant in the Eucha Watershed, feed mill, truck shop, multiple hatcheries, gas storage facility. All these are outside the Illinois River Watershed and they're clearly irrelevant.

Another example, this request for production number three, the reason that Peterson Farms entered the sale. They make an argument in the brief that says, well, there may be documents in there discussing that Peterson was motivated to enter the sale because of exposure to liability in the lawsuit. Well, if that had been the request for production I could have responded without the need for the protective order. But they

didn't. They asked for documents regarding the reason without regarding to whether it has anything to do with this lawsuit. And, Your Honor, I submit that gets about as -- that invades about the most intimate of Peterson Farms confidentiality at that point.

The last one is this request for production number four. To the extent there are any documents exchanged between Peterson and Simmons during the period that they were negotiating this transaction, this lawsuit was ongoing, active, and I suspect the parties did communicate as they are allowed to do within the privilege during that time. How you would decide which of those are related to the transaction, which are related to the common defense, I don't know how to do that. But I do know that whether it was tangentially related to the sale does not take it outside the privilege, and I don't think plaintiffs are contending that the privilege is not valid. And if that's the case, then they need to show there's been a waiver and there has been none. So as to number four, I would suggest to Your Honor the answer is rather absolute as to that analysis.

Frankly, Your Honor, we're here because this is ill-conceived discovery. It's a fishing expedition that's going to place potentially into the hands of our

opponent very sensitive documents. We offered a fair solution that would allow plaintiffs to know how this transaction affects their proceeding forward in this case, how it would potentially affect how they would present their claims. How they -- if they were to achieve a judgment at the end of the day, who will stand for that judgment, and that was rejected. So therefore, Your Honor, I think based upon the requests, and they appear willing to stand on them, then we would suggest they're facially over-broad and we'd ask that you sustain our motion.

THE COURT: Mr. McDaniel, as to number four, you suggest that's a fairly absolute. But don't the documents exchange or the communication exchange have to be in furtherance of the common defense to be covered by the joint defense agreement or the common defense?

MR. McDANIEL: Well, I think, Your Honor, that -- I think we all agree that the joint defense is not in and of itself a privilege. It prevents a waiver of a privilege that otherwise exists. And so, in that case, those communications whether they're involving counsel for the two parties and their clients are involved, their can be an attorney/client communication privilege that's not waived by virtue of sharing it with Simmons as it relates to their common defense in this

case. If the companies share their assessment of exposure in this case with each other so that each company can evaluate what's an appropriate price, do we need an indemnity, I'd say that is all part of mill impressions of the counsel, it's work product, it can be co-party communication. I think there's a line there that we cannot objectively carve out. And I don't want to give the impression to either you or opposing counsel that there are such analysis. Obviously, I'm dealing with these requests on their face. My concern is if there is some standard articulated by the Court that says that communication must be in furtherance of the defense, we'll end up back here arguing over whether a particular communication is or not. If we log it, the plaintiff's position will be, well, you didn't describe it well enough to substantiate that it was in furtherance. I think we're going to make this a lot messier.

THE COURT: Do you know at this point what the universe of documents would be that would be responsive to number four?

MR. McDANIEL: I believe I know what they would be for my client, yes.

THE COURT: And how extensive is that universe?

MR. McDANIEL: It's not extensive at all.

THE COURT: So in other words, if the Court

wanted to look at these documents in camera, for example, just to make -- give us all some comfort level that at least they had been screened to some degree, it wouldn't take me until the end of my time on the bench whenever that might be?

MR. McDANIEL: No, it wouldn't. And when you see what there is, you may say, well, what's the big deal. Why are we here on this. The issue is not specifically these documents, the issue is how this joint defense common interest privilege will be viewed by the Court is my -- I'm sorry.

THE COURT: That's all right. Go ahead and finish.

MR. McDANIEL: What I was going to say is what I would -- what clearly what I have viewed is the only document that mentions this litigation that was exchanged that my client has provided me, that one document doesn't concern me substantively. What concerns me is what I said before, is that obviously there is a lot of communication between these companies and counsel in joint defense, is that we're going to step out of what was actually exchanged in the transaction into another very soft realm that the plaintiffs will seek to invade further into mental impressions of counsel, attorney/client communications, joint defense

communications that may have occurred during the period that the parties were discussing it. But the transaction itself wasn't a motivation. And just based upon our history where we have succeeded in working out some disputes, but often we're here seeking the Court's advice, that's my primary concern.

THE COURT: Do I understand that -- I think Judge Joyner looked at the joint defense agreement previously?

MR. McDANIEL: That is correct.

THE COURT: Of course, I haven't seen it, so I don't know exactly. I assume it's probably a standard JDA, but I don't know. I haven't seen the document.

MR. McDANIEL: If my recollection is correct -- and I invite any of the counsel to correct me -- there was an issue about should it be produced to the other side. Judge Joyner looked at it in camera and his decision was that it did not need to be produced. Am I correct about that? So I know that was the context in which he viewed it.

THE COURT: Okay. Is there anything else from Peterson?

MR. McDANIEL: No, thank you.

THE COURT: All right. Mr. Elrod.

MR. ELROD: Thank you, Your Honor. Welcome to

the case. I have nothing further to say regarding the argument. I'd just like to put a little more meat on the bones in terms of who these parties and the milieu in which they operate. Simmons Foods, my client, is a company that's about 60 years old. It's in the second and third generation of operation right now. Peterson Farms is probably 70 to 75 years old. As a matter of fact, the founder of Peterson just passed away last year. He was approaching 100 years of age and made it to 100. So these truly are privately-owned family enterprises which operate within a very competitive poultry production environment in northwest Arkansas and northeast Oklahoma, in fact, in the United States. While I love my sisters and brothers on the same side of the table as me in this lawsuit, and while I have a great deal of respect and have known most of the owners of all the defendants except for Cargill for my entire life and have a great deal of respect for people like Don Tyson and Mr. Peterson when he was alive and the George family, we compete each other. And the financial information that is contained within these transactional documents is totally irrelevant to the issues in this lawsuit. And it is kept closely to the -- it is kept closely to the chest of the people involved in the transaction of the people who work for them. In fact, it's just nobody's business.

The only people we have to answer to without two shareholders are the Internal Revenue Service and our bankers. And so, this is very sensitive information that we -- and that's probably the reason we reacted the way we have.

In regard to request number four, outside of the issues of this lawsuit, outside of the joint defense agreement that exists, Your Honor, there were transactional lawyers involved in this case in this transaction who have nothing to do with this litigation. So I'm assuming that the attorney/client privilege is going to apply for communications between counsel inside Simmons and counsel inside Peterson that were involved in the transaction. And communications between counsel for Simmons and Simmons and counsel for Peterson and Peterson within this transaction that still would remain privileged regardless of the exist -- nonexistence of the joint defense agreement.

I think those are my comments. I obviously adopt all of the words from Mr. McDaniel as if I had said them myself. I'd be glad to answer any questions.

THE COURT: All right. Let's move on and let me hear from the state on this issue.

MR. BULLOCK: Judge, let me first make a point in terms of the way that we went about trying to get this

down to core documents. Our proposal that an index be provided appeared to be a good way to sort through some of these issues. And while counsel says the documents don't have an index, first of all, I suppose that the documents have some type of internal categories labeled sub-parts or whatever that could create an index or that counsel could provide us with an index allowing us to sort out. We don't have any interest in the gas company, they're absolutely right. But we do have an interest in the transfer of the live production, not merely because it is solely what -- or it is what is solely in the IRW, but it is important in terms of issues in this company that particularly as to Peterson that counsel has on numerous occasions interjected in arguments before this Court and which we anticipate or believe may be offered at the jury as to both the burden that this litigation has posed upon this company, the small size of the company operations, and all with the suggestion of a lack of sophistication of you as to the scope of this company's live production operations that were transferred to Simmons in total, apparently, is important as to all of those issues. And so, just as a general matter, I think that the relevancy of the information in these documents is much broader than what counsel suggests.

I'd further point out that as for their suggestion as to how to resolve this and the letter which the Court will find attached to their motion, there is no response as to our request two, three and four. That is, they offer nothing in terms of environmental due diligence, offer nothing in terms of reasons for sale and offer nothing as to the facts relevant to the case contained in those documents. And as to that category, counsel's right. If it's a letter between the transactional -- Peterson's transactional lawyer and Peterson's board or Peterson officials, no one would suggest here that we have a right to see that. But if it is a letter from Peterson's transactional lawyer to Simmons' transactional lawyer relating to the facts of this case, certainly we do have a right to see that provided that the subject matter is relevant. And by definition, that is a relevant area for us to see and they offer us nothing in that regard even though counsel now says they have at least a document which does.

So, as I said, the asset purchase agreement, since it is the transfer of all of the live production including that within the IRW is on its face a relevant document that we have a right to see and we're certainly willing to work with the defendants in terms of narrowing that so that it doesn't capture such things as transfer

of the gas company.

THE COURT: Isn't that what Mr. McDaniel was offering?

MR. BULLOCK: No, I don't think that that is. I mean, he very clearly said that he was -- what I read his proposal was that it would be a very narrowly redacted document, not merely taking out such things as the gas company, but rather posing it as the narrowest of offers and it was a take it or leave it type of offer. That is, once you agree to this, then we have satisfied it. We did a similar -- there is also an asset purchase of Willowbrook, a defendant in this case and Cargill. And in that case what we did was made an agreement where Cargill produced a rather heavily redacted copy of the asset purchase agreement. It did have an index, it also had the subheadings. We got all of the subheadings, some of the document and with the proposal that we could go forward from there once we saw what was there. That was not the nature of this -- of their offer as we read it. It was a take it or leave it. We will redact it and that will satisfy your request.

We received nothing, as I said, in terms of the environmental due diligence. And again, that on its face is something that we should have been entitled to. And when they made their offer there's no mention of that.

And the other issue are the reasons for sale. That's particularly important should we meet at trial as we have met in arguments before this Court suggestions that this litigation somehow unfairly burdened this company. I think that we have a right to know the reasons that they stated for the sale, and similarly and related to it, what did they get for it. If you're going to claim that we caused this then the relevance would be, well, what was your operation worth.

And so, I believe that our request was properly formed, that we worked with the defendants to meet their requests and the result was a very narrow take it or leave it proposal. And we'd ask the Court to deny their protective order, have them respond and provide the documents as we've described here.

THE COURT: All right. Anything in response? Mr. McDaniel.

MR. McDANIEL: Your Honor, Peterson Farms has not put at issue in this case anything that would allow the plaintiffs to invade its reasoning for this sale beyond the fact of whether or not it was related to this case. And as I said in my opening argument, had that been the request we could have responded. Mr. Bullock has not so limited his argument.

The question of the burden that defending this

case or being a member of the poultry industry in northwest Arkansas and eastern Oklahoma at times such as this, the size and sophistication of Peterson Farms are all issues that Peterson has responded to through its presenting 30(b)(6) witnesses, et cetera, that's not illuminated by this asset purchase agreement.

Your Honor, the reason -- and I think Mr. Bullock makes one valid point and that is in my proposal to them, I did not make a suggestion how to handle the environmental due diligence request, so let me make that clear. And the reason that I didn't be it by oversight is there are no documents in that category because the only assets were chickens. My client advises me as part of the transaction there was not environmental due diligence conducted of the chickens. My client does not own the farms, and therefore there was no environmental due diligence of the contract poultry farms. So there's documents in that category and that's the reason that I didn't have anything to propose with regard to that. That's all I want to add, Your Honor.

THE COURT: Was Mr. Bullock ever told that we have no documents in that category, so there's no need to discuss this?

MR. McDANIEL: Honestly, I think not. Because I think at the time I was doing this I didn't know the

universe of documents.

THE COURT: I mean, that would have been helpful, certainly even up to this morning to convey that information so that we weren't, you know, playing tennis with an imaginary ball here. That's kind of what we're doing.

Mr. McDaniel, let me ask you something because we have a confidentiality order in place with two levels of confidentiality. Now, I understand and I think I agree in large part with the argument, I think you posed it, that before we ever get to that issue, we've got to get over the relevancy and burdensomeness hurdles. That just because there's a protective order in place, that doesn't mean that everything is fair game and we can just say, well, we've got a protective order so don't worry about it. We've got other issues. It's got to go through the Rule 26 analysis before we can get to the protective order part of that. But on some of this material, clearly we've got that in place and I wanted to ask you. There's a provision in that order, paragraph seven that says: No party may withhold information from discovery on the ground that it requires protection greater than that afforded about this order unless the party moves for an order providing such special protection.

How does that provision play, if at all, into this whole discussion we're having this morning?

MR. McDANIEL: My reading of that order which I believe the parties did stipulate to is it doesn't have any bearing, Your Honor. The reason being is the issue of the confidentiality and sensitivity of the information is part of the way we ask the Court to balance prejudice versus probative value. The threshold issue on these requests one, two, and three is the overbreadth and that there's a narrow band of information that is arguably relevant, should be discoverable. This greater bandwidth that's going to be pulled in, the reason we're so concerned about that is because of the confidentiality. Granted, you articulated my argument better than I did. If the Court orders it produced, we have a mechanism for trying to protect it. That is only going to be of limited value.

First off, if -- I have to view this from my client's perspective. These people -- no personal offense. But these people, this client, above all is who they do not want to have personal financial information unless the Court specifically determines that it's relevant and probative. So the fact that they have to manage it in a certain way is not much solace to my client.

Second is, once it is outside of Peterson Farms there is a mechanism for it being managed, but it doesn't mean that it won't see the light of day in this courtroom. So the idea is, Your Honor, rather than put our sensitive documents at risk in our opponents' hands, then there should be some inquiry as to whether there is any potential -- that it is discoverable, that it's relevant and it meets the Rule 26 guidelines as being relevant to a claim or defense. Our position is the plaintiffs have not carried the burden to expand beyond that threshold and I think they have to show good cause. I think the case law shows that.

THE COURT: But you moved for the protective order, so isn't the burden on you to show good cause for a protective order?

MR. McDANIEL: Well, I think we have. I think it's on the face of the request, Your Honor, because regardless of who's the movant, the party propounding this discovery has an obligation to narrowly craft their discovery to seek the information that fits within Rule 26. On its face this discovery doe not do that and we believe we're entitled to relief.

THE COURT: Are there aspects the asset purchase agreement itself, that document itself, that you contend are so sensitive that they can't be produced even

under the existing confidentially order?

MR. McDANIEL: Well, to the extent Your Honor's question suggests that the confidentiality order affects discoverability, I'm not sure that's what you're suggesting.

THE COURT: Well, no. But I don't know. If we're going to argue the relevance part one it, I mean, one of the main reasons for the Rule 37 conferences is for you folks who know better than I the specific relevance of materials in this case and you can kind of hash that out and that didn't work, so you're here. But the question I guess I have is I don't know -- you've said that they're entitled to know the assets that were purchased. That would be in the asset purchase agreement, I assume?

MR. McDANIEL: Correct.

THE COURT: I'm just trying to figure out what's in the asset purchase agreement itself, that document itself, that would be problematic beyond that. I mean, obviously, there's probably a provision in there for sale of the LP Gas Company, and clearly I think the understanding I hear -- I think Mr. Bullock said that they have no interest in that. So that's clearly irrelevant. But whether it necessarily requires that we go through a redaction process, I don't know.

MR. McDANIEL: Well, no, not on that point. As a matter of fact, even though we think there are a lot of assets that are irrelevant to the case, we don't mind disclosing there -- I believe there's an attachment that is a general list of these operations and facilities, structures, sites -- (Interrupted)

THE COURT: -- Decatur, Arkansas, aren't there?

MR. McDANIEL: And with the exception of the gas companies, yes, that's right.

THE COURT: While those buildings, et cetera, are not within the Illinois River Watershed, there are documents in there that relate to operations within the Illinois River Watershed; isn't that fair to say?

MR. McDANIEL: Documents in the buildings?

THE COURT: Yes. As I understood, and I think I read some deposition testimony that someone offered -- maybe it was Ms. Wilkinson, to the extent describing what's there, that there are files, et cetera, kept. I mean, it's not a total disconnect between what's in the Decatur offices and the IRW operations?

MR. McDANIEL: That's true. In fact, the feed mill produced feed that was fed to chickens in the Illinois River Watershed. There's only -- Peterson only has one complex. So, the question is if you know -- for instance, if you know that the processing plant is

transferred, now Simmons operates it. If you know that that feed mill feeding those chickens is operated by Simmons, beyond that where do we go? Now, the documents that contained within them to the extent they are Peterson's, they are still Peterson's. Now, granted, Simmons needs certain transferred documents related to growers that transferred. We've been all through the document discovery on the merits. I'm not sure that's really what we're arguing about.

But back to the Court's prior question in the asset purchase package, what else is sensitive. The price, the payment terms, how funding is to be handled between the parties on both sides of the transaction I think are matters that both parties feel are private. Mr. Bullock makes an argument about, well, are we entitled to know what it's worth, I guess we can argue that. But we're going to be here Monday talking about financial disclosure and so the net worth of Simmons Foods and Peterson Farms, that information is -- has been produced, is being produced. I think that's where the answer to that question is to the extent that's relevant to any question that will come up in this proceeding.

And the question the Court asked about what else in there could be sensitive, I think I hit on what are most important. But what we're asking the Court to

do is to agree with us about what are the relevant issues for the plaintiffs. And if the Court elects not to simply grant the motion as presented, if the Court wants to articulate a solution, then what we'd ask the Court to do is something along the lines of the proposal and that is these topics are relevant for the plaintiffs and Simmons and Peterson go to the APA package, go to in any other documents that address these specific documents and produce and that gives us something to work with.

THE COURT: Okay. Anything else on this one?

MR. ELROD: Judge, in regard to the confidentiality agreement between the parties, to be frank with you, I don't recall whether there's a mechanism within that document that permits us to keep information from each other on this side of the table. And on a scale of one to 10, if not wanting the state to our sensitive information is nine, me not wanting them to see it is a 10 which goes back to the point I made earlier about the competition between these defendants in the marketplace. That's the only point I would have to make.

THE COURT: Anything further from the state?

MR. BULLOCK: No, Your Honor.

THE COURT: Okay. Here's what I think we should do on this one. I'll grant the protective order

in part. I think with respect to number one, the defendants should produce any transaction documents or contracts regarding the asset purchase in June of 2008, including indemnification agreements, that regard the assets purchased and any agreements related to the liabilities of their respective parties for poultry operations in the Illinois River Watershed. That would not exclude financial information.

MR. ELROD: It would not exclude?

THE COURT: Would not include financial information. In other words, let's let them look at the asset purchase agreement and any indemnification agreements or any other contracts that relate to this, but limited to what's being purchased, the assets purchased, and anything that involves liabilities. Those seem to be the primary concerns here.

Number two, any environmental reports, et cetera, regarding poultry waste or poultry operations that were done in connection with the June 2008 asset purchase or July 2008. In other words, not necessarily limited to the IRW, although I can't imagine why documents that weren't specifically related to this -- to the IRW would be included in that. But it could be broader than that. Any environmental studies that were done in connection with this asset purchase that regard

poultry waste or poultry operations, produce those.

Three, if there are documents that indicate that Peterson's decision to sell its poultry operations in June of '08 were motivated or influenced by environmental issues related to poultry operations, produce those. Mr. McDaniel has indicated that he doesn't think -- he's convinced there aren't any. But if there aren't, then just say that. We probably could have skipped over that one if that's the case.

On number four, I want you to produce any responsive documents for in camera review. I want to take a look at them. That should give the state some assurance that at least they're being looked at for relevance, et cetera, whether there's privilege attaching to them, whether any of that privilege may have been weigh waived. But at least there will be a review by the Court and we'll determine whether or not there's anything that needs to be produced. Mr. Bullock.

MR. BULLOCK: If I might just clarify, Judge, did you say as to number one that it was limited to assets in the IRW?

THE COURT: It was limited to -- regarding the assets that were purchased, all the assets purchased, and so that you'll know what was purchased and what wasn't. I think that's fair game. It may be that attachment that

lists everything will do that. And any agreements related to liabilities for poultry operations.

MR. BULLOCK: All right.

THE COURT: So that's relative. How long do you think that it will take to do that? Can you do that within 10 days?

MR. ELROD: Yes, Your Honor.

MR. McDANIEL: Elrod can. I'm just teasing. That's fine.

THE COURT: Ten days and then the number four documents produced to the Court and we'll take a look at them. Okay. So, we'll show that Docket Number 1775 and 1779 are granted in part, denied in part. Hopefully that will get you along the same lines with -- apparently you worked out something with Cargill and maybe this will do the same thing and we can get over this one and move on down the road. This one seems like one that should have been worked out before here, but I don't know the whole history of this. I'm the new guy on the block as far as chicken waste goes.

Okay. We've got Numbers 1853, 1854, 1857. They're somewhat interrelated. Have you folks on 1854 -- which is defendants' motion to compel production of expert materials. As I read these briefs, the state said we produced everything but these items identifying

information on the survey respondents. And you've got all that and I know that there was something going back and forth and there were some files that there was a problem getting into. Are we down now to that issue on the materials?

MR. EHRICH: If I may, Your Honor.

THE COURT: Okay. And if you would -- I guess we have a court reporter here, but still if you'd speak into a microphone just to make sure we've got you on tape as well.

MR. EHRICH: Thank you, Your Honor. Del Ehrich for Cargill. I don't think your description is entirely accurate. I think there remains a dispute about what we mean by survey respondents. As we set forth in our papers, Your Honor, the state has been at this damage assessment in one form or another for more than two and a half years. So, first, they did a so called recreational use intercept study. Found people on holiday weekend using the IRW, Lake Tenkillier, stopped and asked them questions. They apparently didn't like the answers to those questions. They moved on to a telephone survey. They have talked to as many as 400 people. Again, the record reflects the state's experts didn't like those answers. They found that, in fact, the people they talked to, you know, didn't know much about water quality

issues. In fact, one of the survey authors, Ed Morey, there's a note in his file that says, well, we've got to educate these people on this, right? And that led to the development through multiple phases of the surveying instrument that was actually identified. I have communicated with Mrs. Xidis, you know, our expectation that they will have produced everything as to each step in the process, and I don't think we've got an answer to that question.

Now, as to each step in that process, we want to know as well the identity of the people who are contacted and the people who actually took those various surveys or participated in those phases. So in short, when we talk about survey broadly speaking, we mean all of those phases, and I don't know that the -- that I've ever heard from the plaintiffs that they understand that that's what we're asking and they've actually produced all documents as to other phases. I don't know that that's happened. Then you're correct, Your Honor, as to the identity of the folks that were contacted. The universe of people contacted to participate and that subset that actually did participate in these various phases. I think we are down to that question about their identity, their contact information, particularly addresses, telephone numbers.

We also had a dispute about production of records kept, we presume, by the survey company, but maybe also by the -- some or all of the plaintiffs' testifying experts at Stratus and these various universities as to how many times these people were contacted, when, what they were offered, reasons for joining the survey or refusing. Indeed, we've seen references in the materials to a so called record of actions or words to that effect -- there is some variation -- which we believe means that whoever is contacting these folks and making notes about what they're told. You know, if Mrs. Smith doesn't want to participate, well, why not. Well, they don't know. So again, that's the universe. By no means are we talking only about the identity of these respondents either narrowly as I think the plaintiffs would have it or broadly as we would have it.

THE COURT: All right. Well, that answers at least that. But other than the respondent, the materials that you've just mentioned, there are other things, I think, mentioned in one of the affidavits I saw that had to do with some more technical material and I understood from the state's papers that that's been provided, visual aides, photographs.

MR. EHRICH: We understand, Your Honor, that we

have received not just the final survey instrument that -- (Interrupted)

THE COURT: I've looked at this thing.

MR. EHRICH: All 57 questions?

THE COURT: I've looked at most all of it. I can't say that I've read every word, but I've looked at the scope of the development phase and the focus group phase and the one-on-one phase and all that sort of thing. So I've got some, at least, passing familiarity with what we're talking about here. There's a lot of information there. In fact, on one hand you folks say, gosh, we've gotten so much information that we can't respond to it timely, and then on the other hand say we need more information. So I'm a little curious as to are you asking -- be careful what you ask for. If you can't handle what's already been provided, how far out are we ultimately going to look on this? Because I will tell you this much, that Judge Frizzell is pretty adamant about wanting to make sure that this case is ready for trial in September.

MR. EHRICH: I understand, Your Honor. And certainly we are not suggesting here that a grant of an extension for the damages expert deadline will affect that trial date. In fact, we believe that working together we can accomplish what needs to happen. I will

note that -- (Interrupted)

THE COURT: The date you're proposing right now is past the discovery cutoff by a month and a half. Probably not that -- yes, about a month and a half.

MR. EHRICH: If I may, Your Honor, we already previously -- the Court has already entered orders allowing for additional liability reports due at the end of May for so called spring sampling. And we will all just have to work out how that works.

THE COURT: Is that new reports or is that supplementation?

MR. EHRICH: Well, frankly, it depends on what happens. I mean, it may be -- I mean, I don't know that it makes much difference. We asked for the opportunity to sample in spring because the plaintiffs' contention is that it is the spring rains which caused runoff which caused litter constituents to flow into the Illinois River. And we would not have had under the existing orders at the time the opportunity to do if we wanted to our own spring sampling. So a number of our liability and causation experts who have been disclosed either December 1 or January 30 may have, may have, additional reports, and if that's happens, we will simply have to deal with it. We would presume that we would put those experts up for deposition, we produce all the considered

material, and we just -- we would work it out. And if we needed the Court's assistance to accommodate some of those deadlines for certain subsets of information, we would do that.

Let me point this out as well, Your Honor. If one does a little archeology on this damage deadline, you will find that the defendants really from the initial conference with the Court expressed concern about the length of time that might be required to respond to plaintiffs' damage experts. Now, you know that a number of the pretrial deadlines have already been extended and I think it is fair to say, or at least my recollection is, that whenever those issues came up before the Court, we would note, yes, but there's the damage deadline as well. It's only 60 days, that might not be enough. And the Court noted that but kept the deadline. Obviously a prudent management of the docket. Maybe some time is necessary, maybe it isn't. But that record wasn't developed.

In addition, I would suggest that these defendants have done what they could do to prevent today from ever happening. I mean, as far back as 2006, I know Cargill and I believe other defendants as well have asked damage interrogatories and corresponding document requests. Tell me what your damages are. Tell me what

documents you have. How do you calculate them. And the responses were what you might expect. Well, that's the subject of expert testimony. The pretrial deadlines are set by the Court order. You'll get it when you get it. Okay.

So, the other thing I would add is this seems to be a suggestion by the plaintiffs in their brief, that we should somehow have been anticipating this. Well, if we were supposed to anticipate it, then with all due respect, so were they. They didn't submit a supplement to the interrogatory answers that I've just described. So if they hadn't yet arrived at any understanding, any conclusions, what should we have arrived at?

I would also say that in this realm of valuing so called natural resource damages there are many, many ways at least theoretically -- I'm not saying that they're all reliable -- but at least theoretically to do this. Indeed, the plaintiffs' record suggests that they did try a number of ways. I spent, Your Honor, a lot of time with our natural resource damage economist and it's severely taxing my, you know, undergraduate economics degree, but I'll do my best.

Basically there are ways to value natural resource injuries or injuries to natural resources that are, what, revealed. Revealed preferences. That is, you

can measure how people deal with these resources. So markets might be one thing. Where there is a market, actions speak louder than words. Willing buyer, willing seller. There are other techniques. One could go about measuring the use of the various resources in this watershed and in Lake Tenkillier. How many people fish? How many people rent cabins? How many people participate in the bass fishing tournament? You could do that. And indeed, the Army Corps of Engineers collects, keeps a lot of that data. That's not what they did. You could do what they did in the Residential Intercept Study, that is actually go to people using various resources in the watershed in 2006 and try to gauge, you know, what you're seeing. You could also do a telephone survey. Again, try to gauge what people's actions actually are with respect to the resources in the watershed.

So I guess a couple points. One point is how were we, the defendants, to anticipate what the plaintiffs' experts ultimately would do recognizing that we were told by the plaintiffs in their answers -- their answers to our interrogatories that this would all be subject to the expert testimony. So how would we anticipate that?

The other point, I think, is relevant to the length of time necessary. After the plaintiffs' experts

concluded, presumably, that they couldn't make use of this -- these direct measurements, these use measurements, they turned to developing contingent valuation methods which are essentially hypotheticals. There isn't any -- there's no way to measure, you know, actual transactions, actual use. You go out and you ask people what their stated preferences are and those depend entirely on what's stated in the survey instrument. And you will see, Your Honor, in fact, you've referenced it, the state took tremendous pains to tweak and to test and to sample. They had one-on-one interviews with people. We don't know who they are. Want to know -- (Interrupted)

THE COURT: The one-on-one interviews were to develop the questionnaire.

MR. EHRICH: To development the questionnaire, that's right. Focus groups, they pretest -- (Interrupted)

THE COURT: But the people whose input was gained in that one-on-one interview, that wasn't part of the ultimate survey on which the damage calculation is based.

MR. EHRICH: Well, I disagree with that, because presumably they did that because they wanted to test how descriptions of the watershed, the baseline

conditions, what the injuries are, what caused the injuries, what the restoration may be, how long it may take and then what people would value an enhanced restoration. They wanted to test all those things. So they needed to do that in order to, we say -- I'll be blunt about this -- we say to get the answers that they hoped for. It's like Dr. Morey said, if there's going to be significant damages we've got to educate these people. So, this is all of the people that they talked to in order to tweak and to test and to design the study to accomplish what they wanted to accomplish are part of the process and part of the methodology.

Now, you're right. There are folks who ultimately took the survey and you've seen the cards, you've seen the script. What we don't have is the information about the people who refused. And our economists say non-response bias is critical. You have to know why people didn't take the survey. We think the list of actions that I've referred to before, I envision that as kind of category on some spreadsheet somewhere, some database somewhere, that's going to be critical to us to evaluate in order to determine why people didn't want to do the survey, take the survey.

THE COURT: Plaintiffs' experts say they don't know -- no way to use this respondent information on that

kind of non-response bias, don't they?

MR. EHRICH: They do. But with all due respect, they -- well, what they say is they know of no reason why you would need the identity of those persons in order to do that. But what they don't tell you and what Dr. Desvousges, our expert, says is, well, you need the identity of the people so that you can do two things. One, the least important thing, you can gain some more demographic information. That's why you need to know where people live. But beyond that, you know, you need potentially to contact these people to conduct perhaps the same sort of things that the plaintiffs did. If you changed X to Y, does that change the result?

I'll give you an example. We know -- you've seen it. In the survey respondents are told the Court will enter an injunction stopping poultry litter from being applied. Well, our natural resource damage economist because of 30 years of doing this says, well, look, I can tell you from my experience that that's a signal, that is a signal for respondents that there is something wrong with poultry litter application. It biases the response, and I'll note that, in fact, in the survey you don't find a description of the legal structure, the regulatory structure, that's been in place in the state for more than 10 years. You don't find

that. So, he can tell those sort of things. But again, you can't entirely measure it without actually going to the respondents, and that's what the plaintiffs' experts, Krosnick and Tourangeau say, are not telling you. They sort of ruled out resurveying. What they say is, oh, just knowing that contact information won't tell you. Well, you know, in a narrow sense that's probably right. But they're ruling out using that contact information to actually go and talk to people and potentially resurvey them.

At bottom here's what -- I've struggled with this, and here's the concept I've come up with. Judge, in many ways this is not a new issue for this Court. In 2006 the state sought leave to conduct expedited sampling, environmental sampling, and generated mountains of data. We were getting none of that.

THE COURT: That was the sampling on the mineral content or pollution content of the -- (Interrupted)

MR. EHRICH: Correct. Eventually we moved compel and the Court entered the January 5th, 2007 order and essentially said, you know what, data are facts. Data are facts. Data have to be disclosed. There's no work product protection, or if there is, well, you've waived it because, state, you put this at issue. I'm

shorthanding here, Judge. Well, what the state has been engaged in for the last two and a half years on the damage side is generating facts, generating responses from people. And there is no -- there's no principled reason why these responses should be considered something other than facts.

THE COURT: You've got the responses.

MR. EHRICH: Well, we do -- well, yes, in part we know we've got what the responses are. But here's what I'm getting at, Your Honor. This is not the same -- if there's a difference, it's this difference. Whereas you go out to a stream, you know, pluck up a grab sample, bottle it up, send it to the lab. In this case you've got real people, you know, living, breathing human beings who are responding to questions designed over a course of years by state experts and, yes, they're running the script. But remember, that script's been designed, frankly, to elict responses and the script itself allows for the interviewer to react to interaction with the subject.

THE COURT: All of which would be material for your -- (Interrupted)

MR. EHRICH: Exactly. So this is -- (Interrupted)

THE COURT: -- you haven't.

MR. EHRICH: Well, we -- well, but we don't have those responses entirely and we are being precluded from going out because we don't who the survey respondents are. We can't go out and re-interview those folks. If you change X, does -- you know, if you change X do you get Y, or what do you get.

THE COURT: What if you went out and did your own survey?

MR. EHRICH: Well, that's what I'm talking -- (Interrupted)

THE COURT: You mean of -- you know, admittedly it's perhaps a different pool of people, but a similar sort of survey.

MR. EHRICH: Well, for one thing, it's not uncommon in this industry to resurvey the same folks. From another -- let me pose this thought experiment. Without going out and asking these folks, how do we know that these survey respondents weren't chosen to be friends, relatives, political supporters of the attorney general? I mean, I think that's a bit ridiculous, but I think there's a point there that the responses generated by this set of people at bottom are the basis for a $600 million claim. And what the state's really saying is that we shouldn't be allowed to go out and contact those folks potentially, resurvey them, test their methodology,

figure out what the interaction was. Again, Mrs. Smith, now, don't you know that those evil poultry companies did this. Well, yes. So yes gets recorded. How do we know, how do we get at, the rest of this communication, Your Honor? That's what we're talking about.

I will note this: The defendant or the plaintiffs and certainly the amicus rather piously admit that -- or rather piously say, well, you know what, this is all so terribly important. The republic will fall if survey company -- these polling organizations, you know, have to give up the identity of their respondents. Well, I've got a couple responses. One is that the plaintiffs' experts discussed whether they should offer promises of confidentiality to these respondents and they decided not to. That's the fundamental flaw in the amicus brief, Your Honor. Repeatedly it makes assertions that these respondents were given promises of confidentiality. No, they weren't. There is also no inherent privilege surveyor and the surveyed as the amicus correctly concedes. So, even the plaintiffs' experts didn't think up front that they should offer confidentiality, so why are they getting out to cloak a survey that is not done for arguably noble causes such as political polling or, you know, trying to figure out what the latest fragrance out to be for the latest brand of soap? This is purely

private litigation. And you know, we ought to be -- we the defendants who are alleged to have cause in excess of $600 million of damages ought to be allowed to contact these folks and determine in part the basis for those claims. That's at the heart of our motion.

Now, back to your original question about the extension of time. This was an enormous effort, and enormous undertaking by the plaintiffs. Two and a half years, 75 people involved, seven experts, three polling companies. Our expert says, boy, you know, if you gave me that assignment, that would probably cost four and a half million dollars. We did what we could do to protect ourselves with the answers, we expressed skepticism before, we couldn't have anticipated this, and when we got the material we have been running as hard as we can.

If Your Honor chooses -- and I hope you don't -- chooses to keep the deadline at March 2nd, well, you know, we will do the best we can. We'll have many cogent critiques. But if we have more time, we will more fully critique, take apart, these analyses. And if we get the opportunity to talk to the survey respondents every step of the way and decide actually to do that, you know, we will have one heck of a report by June 2nd.

Now, I think it fair to characterize the plaintiffs' response in part as, well, these folks just

want to go out and harass these people. I may overstate, if I do they'll correct me. But nothing could be further from the truth. You know, the information you get from these respondents is only probative if it's put in the context that an economist, you know, familiar with polling would -- you know, would say is reasonable. Right. You know, polling one out of the 3,000 people who were contacted and Mrs. Smith says I was brow-beaten by, you know, these interviewers, well, you know, that has marginal relevance, maybe use that cross examine some of these folks, but it's got marginal relevance. If you asked 500 and they all had that same story, maybe different.

So, you know, we certainly do not have any intent to harass, to oppress, to pursue folks. And I offer you this promise: We will do it -- we will cause no more inconvenience to the folks than the plaintiffs' expert did. You've seen the survey. These folks were pursued with advance letters promising 20 bucks to take the survey. They were pursued with screeners who would show up on their doorstep who would give them an initial survey and then if they passed that they would give them a full survey. Up to 30 minutes. I mean, this is not the Gallup polling company calling on October 31, you know, spending seven minutes trying to determine which

presidential candidate you're going talk to. I mean, this was a major, major undertaking and a major inconvenience for those folks. And so, the notion that we would do anything more -- frankly would do less. But if we would do anything more, it just doesn't -- it just has no merit.

So, Your Honor, we're asking for an extension to June 2nd. We will work to accommodate ourselves to those deadlines. We think that it can be done. We think it's already in the schedule given we've got May 30 as a deadline for other liability experts. There isn't any confidentiality here. No promise of confidentiality, no inherent privilege. These polling companies, you know, on whose behalf the plaintiffs have sought a protective order, Westat, Consumer Logic, you know, are part of this team. They're not consulting experts. They've got no ability to say you can't see the data that I generate including how I dealt with this pool of prospective interviews and their respondents. And so, that ought to be ordered to be produced as well if it hasn't been already. I'm happy to take questions, Your Honor.

THE COURT: Well, let me hear from the state.

Ms. Moll, is that right?

MS. MOLL: Yes, Moll. May it please the Court. Ingrid Moll on behalf of the State of Oklahoma. You're

quite right, Your Honor, that these motions are intertwined, so if you'll bear with me, I'd like to start on the motion to compel that the defendants filed.

I will put aside for now Mr. Ehrich's speculations about how these state's experts felt after the recreation study and telephone survey after those were done. That is the subject of deposition testimony whenever the experts are actually deposed.

But let me address the question that Your Honor started with which was: Is there anything really here to your motion to compel. And I'll steal the phrase you used earlier about playing tennis with an imaginary ball. If the motion were granted, I don't know what I would produce. Quite frankly, I don't know how to say it any differently or any more times to the defendants that we have produced all materials considered by the authors of what we call the CV report. They have everything that the authors considered. To the extent that there were very narrow pieces of information relating to participant identities that were in the hands of the authors, they have it. It's not as though we're sitting on a few boxes of material and simply refused to produce it. So with respect to the motion to compel the state -- obviously, because I don't know what we would produce -- respectively request that the Court deny that motion.

Then of course, part of the motion also incorporates their request for more time. But when you seek an extension to some piece of a scheduling order, you obviously have to have good cause. Rule 16 requires it. This Court has previously said in an order from last summer which we quote in our papers that an extension will only be granted if there's unforeseeable good cause. And good cause, that standard, of course, implicates the principle that the party seeking an extension has exercised due diligence but simply cannot reasonably meet the deadline. So, let me make just a couple points on the issue of whether the defendants have made a good effort, good faith effort, to even attempt to comply with the March 2nd deadline and I respectfully suggest that they have not.

First, with regard to deposition scheduling, as the Court's aware, there are seven authors to the CV report that was produced on January 5 of this year. One month past, and on the issue of scheduling depos the defendants were radio silent. So realizing that their deadline was one month away, the state took it upon itself with -- unusual to, you know, try to help out the other side to put depositions together on their own behalf, but we did. And so, one month later on February 3rd having heard nothing from them on the issue of

scheduling the depositions of these seven people, who as the Court can understand, have busy schedules as well and a lot of moving pieces here, we put together a proposed schedule, gave that to the defendants and said let us know if you'd like to take us up on any of these dates. There was an e-mail exchange that didn't have much substance to it and there was never any attempt to schedule even one of the seven depositions, and to my knowledge to date, there's been no attempt to do it and March 2nd is just a few days away.

Also, on the issue of the non-party subpoenas that Your Honor has read about in the papers, the defendants are, at least the Tyson defendants, issued three subpoenas to Westat, Consumer Logic and Wilson Research to get, among other things, the respondents' identities. The three parties have retained separate counsel and separately but timely objected to the subpoenas on various grounds, but including the issue of confidentiality of the respondents' identities. There has been no attempt by the defendants, at least up until Monday, to contact any of the three subpoenaed parties to meet and confer over their objections. But in any event, the state obviously moved for a protective order to preclude any further disclosure of that confidential information and to prevent the defendants from contacting

these people to the extent that they might have bits and pieces of information relating to -- (Interrupted)

THE COURT: -- confidential, why was the confidentiality clause taken out of this agreement that's been referenced?

MS. MOLL: As Your Honor is aware, there was some discussion among the experts as to whether an expressed guaranty of confidentiality should go into the this survey. And the decision was made that as a matter of survey ethics, that it should not go in even where there was a remote possibility that one day a Court might order their identities disclosed. So the decision was made, I believe I can safely say, as a matter of survey ethics. But on that point, that shouldn't change the Court's conclusion, and let me tell you why.

The CASRO and AAPOR Standards governing survey ethics, as you know, they have strict requirements of keeping that information confidential, and we cite to the specific provisions. But the point is that that requirement of confidentiality does not hinge on whether the respondent was guaranteed confidentiality by the interviewer. Instead, these standards make clear that confidentiality is to be preserved unless -- and this is very important -- unless the respondent expressly consents to the disclosure of their identifying

information. So you cannot infer from the lack of an expressed guaranty by the interviewer of confidentiality that the respondent has expressly consented to further use of their identifying information.

THE COURT: Were they given that option? Were they given that opportunity to expressly consent to disclosure?

MS. MOLL: I don't believe -- (Interrupted)

THE COURT: -- was not even mentioned.

MS. MOLL: I don't believe it was mentioned, but certainly there's no suggestion that any expressed consent was given.

Let me address another point that Mr. Ehrich raised that they don't intend to use the information or correspond with these people any more than the state's experts and their independent contractors did. To me that is just not credible. Last week the defendants submitted the joint fact witnesses list for trial. And on that list of witnesses that they intend to call at trial, or at least reserve the right to call at trial, on page 38 of that is the category of survey respondents of the Stratus Consulting damages survey. The notion that these people are now going to be re-interviewed which the two survey experts for the state, Drs. Tourangeau and Krosnick, have said, you know, there is no standard

procedure in survey research that requires re-interviewing, or quite frankly, permits it. But the notion that these people are now going to be re-interviewed and if defendants' fact witness list is going to play out, subpoenaed for trial, potentially deposed and hailed into federal court I would suggest is going beyond what the state has done and is the -- at least at a minimum, one of the very reasons why the state is seeking a protective order to protect these people.

Speaking further on the issue of the timeliness of the production of considered materials. Throughout the defendants' submissions there are suggestions that the state did not comply with the January 5 deadline in the scheduling order. Let me take that in a few pieces. First, they suggest that we should have produced materials up and to January 5. We note in footnote nine of our opposition to the motion to compel that they at least knew about the survey last summer. But in any event, the scheduling order is what it is. The deadline was set for January 5 and the state complied with it. The defendants are correct that there was a supplemental production on January 8th, but that should not take a life on its own. That production was a very limited production of e-mails that were exchanged among the experts in the very days leading up to January 5. So I

think the Court can appreciate just the logistical issues that go into gathering the documents of seven authors and preparing them for production. So it cannot be said that in the three days between January 5 and January 8th there was any prejudice to the defendants resulting from that supplemental production. That production also included some e-mail attachments for which there were some technical issues which is beyond my expertise. But in any event, some technical issue arose because of some university e-mail systems and some constraints there.

THE COURT: In other words, whether the defendants would have access to files that were, I think, attached, is that right?

MS. MOLL: Not whether they were attached, but our ability to obtain them and produce them.

THE COURT: Right. Then there was an issue, I thought, about a corrupted file or some such thing and that ultimately the final production of this material occurred on, I think, February 3rd is what I read.

MS. MOLL: I think that date is correct, Your Honor. And defendants' statement that, you know, defendants -- that the state's compliance with that January 5 deadline wasn't -- you know, didn't occur for a month after is misleading, quite frankly. The one file that was produced at the beginning of February was a file

that had some kind of electronic formatting or corruption problem with it completely unbeknownst to the experts and the state. And when it was brought to our attention we rectified immediately -- (Interrupted)

THE COURT: How much material are we talking about -- (Interrupted)

MS. MOLL: I think it was 20 or so page article and that's it. And then they also make an issue about the password protected files. This is another nonstarter. They complain that they didn't have access to certain files. As soon as we realized that certain files remain password protected, we provided those passwords, but we pointed out at the time that they had the exact same files on January 5 in an un-password protected format so they didn't receive anything new at the end of January. So there's simply no prejudice that has resulted from any of these, you know, kind of garden variety discovery issues when you're talking about a massive production.

I think even more importantly or as importantly as to what I just said, the notion that the remaining deadlines in this scheduling order will remain unchanged. I think that too lacks credibility. Your Honor pointed out earlier that discovery is set to cut off on April 16th. We have dispositive motions due May 18th and

exchange of exhibits and deposition designations due on June 1st. These are all things that are supposed to occur before their proposed June 2nd deadline. I don't know how that can occur. And also, you know, motions in limine are due July 6th. Obviously after they disclose their experts and produce whatever reports they're going to produce, the state needs some, you know, reasonable amount of time to review the document production, depose these people.

THE COURT: That July 6th in limine deadline, is that -- I don't recall from looking at the schedule. Does that include Daubert motions or is there anything built into the schedule for the Daubert process?

MS. MOLL: Your Honor, frankly, I'm not sure about whether the scheduling order expressly identifies a deadline for Daubert.

MR. EHRICH: Your Honor, if I may. It doesn't talk about Daubert motions. July 6th is the motion in limine deadline which I guess we -- (Interrupted)

THE COURT: Would include that. Okay. I figured it's got to be in there one place or another, but I didn't know whether there was a specific Daubert deadline or whether it probably was rolled into the in limine deadline.

MS. MOLL: So those are my comments on the

motion for extension of time.

THE COURT: One of the defendants' arguments here, Ms. Moll, is that, gosh, you produced so much stuff on January 5th that you took two-and-a-half years to do all this and how are we supposed to respond to that in sixty days, which maybe is an issue that could have been addressed earlier. But in that event, it's one of the arguments that's put before us today. Now, I don't imagine that the defendants would be arguing that since it took you two or two-and-a-half years to produce your survey that they get two to two-and-a-half years to respond to it because certainly that's a no-brainer. But how do you respond to their statement that, gosh, sixty days isn't enough time to respond to all this when we've 12 gigs of information and data, and by the way, we want a lot more?

MS. MOLL: A couple points, Your Honor. As I mentioned before, the defendants knew that this survey was going on at least as early as last summer.

THE COURT: Did they know what kind of survey was going on?

MS. MOLL: That had a draft at the time.

THE COURT: A draft of the CV survey?

MS. MOLL: Correct. And we highlight that, I believe, in footnote nine of our opposition to the motion

to compel. And simultaneously, they certainly could have engaged in implementing their own survey. So it should be no surprise or should have been no surprise that the production in January was going to be voluminous when you're talking about a case like this.

But in any event, the scheduling order has been in place for quite some time and to my knowledge the defendants did not object to the two month period of time when it was put into place. And I guess my main point is this should not have come as a surprise. This is not, you know, a group of defendants that is without an army of counsel. And as Mr. Ehrich has already said, they've already put some cogent arguments together, I guess if the March deadline stays in place. And just from the exchanges that we have had with defense counsel about the quality of the production, certain concerns they have, it certainly seems that they've made good headway. So, those are my comments on that.

If I could speak to the state's motion for protective order because we got into the issue of the confidential nature of the survey respondents' identities with Your Honor's --

THE COURT: Sure.

MS. MOLL: Thank you. As Your Honor knows, the state has filed for a protective order under Rule 26(c).

I need not repeat the standard. Your Honor is certainly well familiar with it. So it all comes down to a weighing of interests. I think the state in its submittal has shown that this information concerning respondent identities is certainly of a confidential nature even in the absence of an expressed promise of confidentiality given to the respondents. And we've cited a number of sources that reflect a presumption against disclosure. The first, of course, is the Federal Judicial Center Reference Manual On Scientific Evidence. I won't repeat what we've quoted on page 10 of our motion. But it's compelling and it instructs that even in the context of litigation that this information is to remain confidential. We've also cited the Professional Standards Governing Survey Researchers by the two leading professional survey research associations, AAPOR and CASRO, who, of course, have submitted an amicus brief. And I'll just highlight one thing that occurs or appears in their brief on page one. The amicus state: Mandating the disclosure of respondent identifiable information would be devastating to all forms of survey research and contrary to public interest. The reliability of any survey evidence may be fully and fairly litigated by the parties without infringing upon the privacy of survey respondents and without threatening important social

interests advanced by survey research.

We've also cited a number of cases where courts have refused to permit the disclosure of respondent identities and so this is not, you know, completely unchartered territory. And of course, the subpoenaed parties have also objected to producing this information and their objections have been attached at Exhibit F to our motion.

I've spoken about the issue of the fact that promises of confidentiality were not made, but as I mentioned, the standards clearly say that disclosure really is only to occur if the respondent him or herself expressly grants such disclosure.

I would just note one thing on the issue of the fact that there's no promise of confidentiality that was given to these folks. The 11th Circuit Court of Appeals in the Farnsworth case that we cited prohibited disclosure of that information even in the absence of a promise of confidentiality and the states urges the Court to enter a similar order.

I'm happy to take any questions. Otherwise, the state requests that the Court grant the protective order requested.

THE COURT: Let's take a short break at this point, 10 minutes or so. You can stretch your legs, go

to the restroom. Then we'll come back and I'll give the defendants here an opportunity to respond.

(Whereupon, a short recess was held after which the following record was made.)

THE COURT: Ms. Moll, let me ask you one other question that occurred to me during the break. The defendants have said, well, there was this Intercept Study and there was a telephone survey and that those things didn't work out so then we went to the CV survey. And what I'm unclear about having read the papers is whether the Intercept survey -- is that the right word?

MS. MOLL: Intercept Study.

THE COURT: Intercept Study was meant to be -- to culminate in an expert report if all things went well. And was the telephone survey supposed to culminate in your expert report if all went well or were those two things sort of preliminary steps on the road toward developing and doing the CV survey?

MS. MOLL: My understanding, Your Honor, is that those two activities were engaged in by the experts as precursors to what was eventually arrived at. It was preliminary in its nature. It was not as the defendants would suggest, you know, they did these things and then didn't like the results so they tried something new. That's not correct.

THE COURT: I just wanted to clear that up. I'll hear from the defendants.

MR. EHRICH: Thank you, Your Honor. Del Ehrich for the Cargill defendants. The state has pointed to the existing deadlines as an impediment to this Court's granting an extension of the March 2nd deadline. In my remarks I talked about archeology. That is, the defendants have been concerned about the narrow gap between the plaintiffs' disclose and the defendants' disclosure almost from the beginning. If you go back to the Rule 26(f) reports you'll see that. But it occurred to me in listening to the state's remarks I should also have added this: That is, we're squashed up against the discovery deadline and the dispositive motion deadline because the state requested and got an extension of the case management order deadlines this Court originally set. Back in December of 2007 there's an order issued extending the expert disclosure deadlines, some of the other interim deadlines. This damage deadline was first set December 1 to something like 2007. And in -- (Interrupted)

THE COURT: How much time -- in that order how much time was there allowed between the provision of the damage report and your expert response?

MR. EHRICH: My recollection is, Your Honor,

that early February of 2008 was supposed to be the damage -- (Interrupted)

THE COURT: So basically the same -- I mean, the same two month period?

MR. EHRICH: And so, what the Court did in that December of 2007 order was to move the liability -- plaintiffs' liability -- expert deadline to, if memory serves, the end of March, kicked out the damage deadline to January 5th. Now, as it happens, the state also requested and obtained additional extensions to their expert deadlines so that the liability expert deadlines became May 15th, May 30th for some of them, and then the Court may be aware that this fall we spent a great deal of time on the effect of the plaintiffs' so called errata for their liability experts which moved some of the liability deadlines. So I mean, the point is, if we're squashed up against these deadlines, it's largely because the Court at the plaintiffs' insistence moved that deadline to January 5th. That's point one. Point two.

THE COURT: But at the same time moved your response, obviously, to -- (Interrupted)

MR. EHRICH: That's correct. But the same 60 days. And that actually leads me to my next point. You know, the state says that, well, we could have been aware, we should have been aware or maybe we were aware

that the state is working on expert damage reports. Well, of course we were. I mean, they answered our interrogatories and said this is for expert testimony. You'll get it when you get it. The suggestion also seems to be because they stuck in a draft of the CV survey instrument into the considered materials of one of their liability experts, Dr. Stevenson, that we should somehow have seen that and said I know what they're going to do, we're going to have a $600 million claim. Well, just stating it that way just illustrates how ridiculous that is. But it also -- there's a serious point here, too, another serious point, and that is if we were supposed to conclude something from the fact that there is this stray, you know, document stuck in the considered material of a liability expert as meaning something, then so should they have known. They should have supplemented their interrogatory answers and told us what they now think we should have known. Of course, they didn't.

So the fact is there's many, many ways to value damages. Defendants, you know, are typically not required to make a damage evaluation before they see the plaintiff's. And so, when we saw that evaluation on January 5th we have been running as hard as we can.

Just a couple of other points, Your Honor, and then I will sit down. I'm concerned that the plaintiff

appears to be conflating, if you will, or maybe confusing confidentiality with privilege. Now, the amicus says there ought to be privilege, there ought to be privilege, for a surveyor, you know, pulling -- and they're honest and they say, well, it doesn't exist now. The state though seems to be saying because something is confidential it shouldn't be produced. Well, we already have a confidentiality order here. We spent part of the morning talking about how to protect confidential business information, competitive information on Peterson and Simmons. So you know, as I understood that argument these folks were saying not that it is privileged in some sense, might be in a joint defense privilege, but just the fact that it was confidential business information didn't by itself mean it couldn't be disclosed. So likewise here, the identities of the respondents, you know, they're not privileged in any sense. Maybe this Court should enter some order -- and indeed, I invite the Court to enter an order -- saying that those identities ought to be kept confidential. They can't be -- you know, they can't give them to a tele-marketer and, you know, that sort of thing. But that doesn't mean they shouldn't be produced.

Another point, the amicus and the state talk again piously about, you know, the survey. It's -- the

sanctity of the survey has to be protected. But you know what, there are Federal Rules of Civil Procedure that govern lawsuits. If a private party or a trade association could, you know, formulate rules of ethics for its members that would trump the, you know, Rules of Civil Procedure as to the scope of Rule 26 and what privileges apply, well, then I've got a couple of defendants on the trade associations on the poultry side that maybe would like to try that trek. So of course that can't be. And again, we're not talking about privilege, we're talking about confidentiality. Should something be disclosed in a way that the wider world gets it. And we're not talking about that.

We were criticized for putting the names of the respondents on the witness list. Well, you know what, here's one example of one of those deadlines. So, February 19th, we have to put the names of -- we have to put a final witness list out. We did. We thought about this. Well, do you put them on there, do you not. Well, if you don't put them on there, is there going to have a fight about that. So we put them on there. Does that mean that we're going to traipse up 189 folks or 3,000 folks here? No, of course not.

I think this is finally, although maybe you'll grant me finallys. Do you see what plaintiff is saying?

The plaintiff is saying, well, because my experts never considered the identity of the contact information, this is not true considered materials and that's what's behind Ms. Moll's statement that honestly, I wouldn't know what to produce. Well, these polling organizations, the three of them, talked to real people who have real names who live at real addresses who responded -- real people responding to this survey instrument. And at bottom these experts are relying on there being real people out there with real addresses, real telephone numbers, responding in a particular way to this survey. So, the notion that somehow we are not entitled to this because it's not considered material is frankly ludicrous. I'd like to take -- I'd like them to take that stance at trial because we may move, frankly, to exclude all of this report. Because at bottom they are relying on responses from real people as meaning something -- (Interrupted)

THE COURT: Isn't that true in any survey? Isn't that true with any survey that's -- (Interrupted)

MR. EHRICH: But they have to bring somebody from Westat, somebody from Consumer Logic, to testify about how that survey is done.

THE COURT: Wouldn't that be true with any survey?

MR. EHRICH: Yes. I'm sorry if I didn't get your point. But that means that there are real people. And in a litigation context where that survey of those real people forms the basis for a $600 million damage claim, Your Honor, I submit that we are equally entitled to the identity of those folks not because we want to oppress, harass, but because we need our economists to evaluate whether they also should be resurveyed to demonstrate the inherent bias and unreliability of this plaintiff's survey.

THE COURT: If you go ahead and resurvey, does the state then have to re-resurvey to counter whatever biases you may have introduced into the whole process?

MR. EHRICH: No. No.

THE COURT: They may think differently.

MR. EHRICH: Well, Your Honor, we've had a whole history over the last six months about what are rebuttal reports and what are supplemental reports. And you know, my view is what this Court has said, Judge Frizzell as recently as a few weeks ago said you don't get those sort of rebuttal reports. There has been to be an end. Has to be an end. What we're asking for is a fair opportunity. If you have anything, Your Honor, otherwise I'm finished.

THE COURT: All right. Is there anything else

from the state?

MS. MOLL: I think one more.

THE COURT: All right.

MS. MOLL: Let me just address one very quick point that Mr. Ehrich raised. Mr. Ehrich suggests that we conflate the notions of confidentiality and privilege. We don't. Rule 26 doesn't require there to be a privilege in place, simply requires the Court to undertake a balancing test of competing interests. And based on the submissions there could be no question that the confidentiality involved here is of a unique nature that designating, you know, information is confidential under the protective order isn't enough. But my basic point is Rule 26, of course, doesn't require privilege to apply. Thank you.

MR. EHRICH: Your Honor, if I may -- (Interrupted)

THE COURT: All right. Your final finally.

MR. EHRICH: This truly is my final comment. From what we've been able to see, the plaintiffs' polling companies and experts did not exclude from their efforts residence in the Northern District of Oklahoma. So, think about that. You know, by our count, a minimum of 3,000 people were contacted and asked about this case and were dosed with information apparently the plaintiffs'

version of this case, one sided. And as an aside, as contrasted to how the federal regulations on natural resource damages estimates say these things should be done which is there ought to be a public process. Leave that aside. You've got the plaintiffs' agents out there in the Northern District of Oklahoma telling their stories to potential jurors. That's another reason why we need that information.

THE COURT: Can't that be handled during voir dire? And isn't that really where that's going to happen?

MR. EHRICH: Well, certainly we would suggest to the Court that that be handled in voir dire. But to the extent -- I think we have to assess just how many of these folks were actually resident in this district. I mean, has this jury pool been contaminated? That's another issue. I'm not suggesting necessarily that we need to deal with that today, but that is a grave concern. It's one of the first things we thought about when we saw this report. Thank you.

THE COURT: All right. I'm going to take these matters under advisement. I will, however, grant the motion for an extension to March 30th given the fact that apparently some material may have been provided or after January 5th or perhaps it wasn't clear to the defendants

what they had until after January 5th. I'll give you some additional time. I think that's warranted.

But I would urge you to live according to the March 30 deadline until you hear otherwise. I intend to try and move on this rather quickly, to get an order out on the protective orders as quickly as possible. And if depending on how we rule on that, then we might change those deadlines more. But I think at this point the most prudent advice would be to live by March 30th and then see what we do. All right.

MR. EHRICH: So that I'm clear, March 30 is the deadline unless and until you say differently?

THE COURT: Right. Right.

MR. EHRICH: Thank you.

THE COURT: I guess that takes care of the matters for today. I'll see some of you, I guess, on Monday. And hopefully we can get through things at least as expeditiously, maybe even a little faster would be nice. Thank you.

(END OF PROCEEDINGS)

C E R T I F I C A T E

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

I, Greg Eustice, Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that on February 26, 2009 the above Proceedings were held before the Honorable Paul J. Cleary, Magistrate Judge in the United States District Court for the Northern District of Oklahoma, and that the same was reduced to writing by me in stenograph, and thereafter transcribed by myself, and is fully and accurately set forth in the preceding 78 pages.

I do further certify that I am not related to nor attorney for any of the said parties, nor otherwise interested in said action.

WITNESS my hand this 10th day of March, 2008.

S-Greg Eustice_____
GREG EUSTICE
Certified Shorthand Reporter